FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL., PETITIONERS

v.

PRIMARY STEEL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's determination that a motor common carrier should be denied recovery of its tariff rate, because of its unreasonable practices in failing to file the negotiated rate originally charged, is compatible with the "filed rate" doctrine.

2. Whether, in a motor carrier's civil action against a shipper to collect unpaid tariff charges, a court is required under the primary jurisdiction doctrine to refer to the ICC the question whether the carrier's unreasonable practices should bar it from collecting the tariff rate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.2d 400. The opinion of the district court (Pet. App. 14a-26a) is reported at 705 F. Supp. 1401. The opinion of the district court granting referral to the Interstate Commerce Commission (J.A. 5-8) is unreported. The decision of the Interstate Commerce Commission (Pet. App. 28a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1989. The petition for a writ of certiorari was

filed on October 16, 1989, and granted on January 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of Sections 10701(a), 10704(b), 10761(a), and 10762(a)(1) of the Interstate Commerce Act, 49 U.S.C. 10701(a), 10704(b), 10761(a), and 10762(a)(1) (1982 & Supp. V 1987) are set forth in an appendix to this brief (App., *infra*, 1a-2a).

STATEMENT

A. The Development of the ICC's *Negotiated Rates* Policy

1. Since 1935, the Interstate Commerce Commission has regulated interstate transportation by motor carriers. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543. Under the Interstate Commerce Act (Act), motor carriers providing transportation services subject to ICC regulation must publish all common carrier rates in tariffs filed with the Commission. 49 U.S.C. 10761(a), 10762(a)(1). The Act further provides that a carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a).

The Act also requires that a carrier's "rate[s]" and "practice[s]" must be reasonable. 49 U.S.C. 10701(a). The authority to enforce the requirement of reasonable rates and practices is reposed exclusively in the ICC. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987). If the ICC determines that a carrier is charging a rate or is engaging in a practice that is unreasonable, the ICC "shall prescribe the rate * * * or practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987).

In a series of cases decided under the Interstate Commerce Act in the early part of this century, this Court developed the principles that later became known as the

"filed rate" doctrine. Under that doctrine, when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain any defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate. See, *e.g.*, *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & Pacific Ry.* v. *Mugg*, 202 U.S. 242, 245 (1906); *Gulf, Colorado & Sante Fe Ry.* v. *Hefley*, 158 U.S. 98 (1895). A primary purpose of the filed rate doctrine, as initially enunciated by this Court, was to reinforce the statutory prohibition against rate discrimination. See *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922). In addition, by divesting courts of the authority to inquire into the reasonableness of imposing a tariff rate in a particular situation, the filed rate doctrine protects "the agency's primary jurisdiction over reasonableness of rates[.]" *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981); *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370, 384 (1932).

2. In 1980, Congress enacted the Motor Carrier Act of 1980 (MCA), Pub L. No. 96-296, 94 Stat. 793, which substantially revised the transportation policy of the United States by encouraging a more competitive environment in the motor carrier industry. Congress directed the ICC, in regulating motor carriers, "to promote competitive and efficient transportation services in order to (A) meet the needs of shippers * * * [and] (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public." 49 U.S.C. 10101(a)(2). Several provisions of the MCA reflect this pro-competition policy. The MCA significantly relaxed restrictions on entry into the motor carrier industry, which resulted in a doubling of the number of licensed motor common carriers during the last decade.[1] The MCA also per-

[1] In 1980, there were approximately 17,000 regulated motor common carriers. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 12 (1980). In 1988, there were over 37,000 such carriers. 1988 ICC Ann. Rep. 141, App. E, Table 1.

mitted carriers to operate as both common carriers and contract carriers, thereby freeing carriers to tailor rates to individual shippers.[2] In addition, in carrying out the MCA's goals, the ICC has authorized common carriers to exercise broader operating authority than previously permitted,[3] and has removed restrictions on volume discounts and common-carrier rates that are specifically limited to a named shipper.[4] The ICC has also sought to facilitate the competitive negotiation of rates by authorizing motor carriers to file tariffs lowering their rates on one day's notice.[5] 49 C.F.R. 1312.39(h)(1).

As a consequence of these regulatory changes, it is common today for carriers and shippers to negotiate the rates charged for particular transportation services. Typically, carriers and shippers will agree upon a rate and other pertinent terms and conditions, the shipper will

[2] The MCA repealed the limitations on a carrier's ability to hold both common and contract carrier authority. See Pub. L. No. 96-296, § 10(b), 94 Stat. 800. A contract carrier may charge a rate to an individual shipper that is different from the rate charged to other, similarly situated shippers. See *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d 301, 310 n.44 (D.C. Cir.) (per curiam), cert. denied, 474 U.S. 1019 (1985).

[3] A carrier may now readily obtain authority to transport virtually all commodities throughout the contiguous 48 states. See *Acceptable Forms of Requests for Operating Authority*, 133 M.C.C. 328 (1984), aff'd in part and rev'd on other grounds *sub nom. American Trucking Ass'ns* v. *ICC*, 659 F.2d 452 (1981), mandate enforced, 669 F.2d 957 (5th Cir. 1982), cert. denied, 460 U.S. 1022 (1983).

[4] See *Petition for Declaratory Order—Lawfulness of Volume Discount Rates—Motor Common Carrier of Property*, 365 I.C.C. 711 (1982), and *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984).

[5] *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146 (1984), aff'd *sub nom. Southern Motor Carriers Rate Conference* v. *United States*, 773 F.2d 1561 (11th Cir. 1985). Previously, a motor carrier had to have a tariff rate on file for 30 days before implementing the new rate.

tender freight to the carrier in reliance upon these agreed-upon terms, and the carrier will then bill the shipper and receive payment at the negotiated rate. The shippers involved in this process generally assume, or in some cases are expressly told, that the carriers will incorporate the negotiated rates in tariffs that will be properly filed with the ICC.

Some motor common carriers, however, have not always complied with the statutory tariff filing requirements. As long as the carrier remains a going concern, these derelictions may go unnoticed. When a carrier becomes bankrupt, however, the receiver or trustee will often retain an auditor to search the records of the carrier for instances in which the rates the carrier billed and collected were lower than the applicable rates on file at the ICC. When these discrepancies are uncovered, the receiver or trustee will then file a collection action to recover the difference from the unsuspecting shipper. Because of rising numbers of motor carrier bankruptcies brought about by increased competition, the number of such actions has increased significantly in recent years. Such claims have also proliferated because some failed carriers made thousands of shipments without properly adjusting their filed tariffs. See 1988 ICC Ann. Rep. 66 & n.9 (McLean Trucking Company bankruptcy alone involved approximately 1,800 undercharge claims).

3. As these actions to recover unpaid tariff charges on behalf of bankrupt carriers became more common, a national shippers' association requested the ICC to address the problem. In response, the ICC carefully considered the issues raised by the increasingly prevalent carrier practice of failing to file negotiated rates, and adopted a policy statement designed to address that practice. *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) [hereinafter *Negotiated Rates I*, re-

produced at J.A. 11-25].[6] The Commission explained that in regulating the reasonableness of carrier practices it was required to accommodate the traditional antidiscrimination goal of the Act with the current congressional emphasis on competition and the marketplace consequences that competition had engendered. Although the filed rate doctrine prohibits courts from considering equitable defenses to carrier undercharge actions, the Commission concluded that the doctrine does not preclude the ICC from exercising its regulatory power under 49 U.S.C. 10701(a), 10704(b)(1) (1982 & Supp. V 1987) to ensure that carrier billing practices are reasonable. In view of the vastly changed regulatory and business environment under the MCA, the Commission determined to reconsider prior policies that had governed its regulation of unfiled motor carrier rates. J.A. 16-17.

The Commission stressed that "carriers must continue to charge the tariff rate, as provided in the statute." J.A. 16. But the ICC explained that "an inflexible policy" of enforcing the filed rate when a carrier had negotiated a rate with a shipper, but had failed to file that rate in a tariff, would "frustrate[] the intent of the [national transportation policy] to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers, and inhibit legitimate pricing initiatives." The Commission further concluded that enforcement of the filed rate "regardless of the circumstances is inappropriate and unnecessary to deter discrimination today." J.A. 20. Noting that "the filed rate doctrine was not intended to condone or reward carriers in the circumstances in-

[6] The shippers' association had proposed that the ICC promulgate a blanket rule declaring that whenever a carrier and shipper have negotiated a rate and the carrier then fails to file an appropriate tariff, the negotiated rate is the maximum reasonable rate that the carrier may charge, provided that the shipper entertained a good faith belief that the negotiated rate was legally applicable. The Commission rejected that proposal in favor of a case-by-case approach based on the reasonable-practice provision of the Act. *Negotiated Rates I*, J.A. 12 & n.1, 14-16.

volved here, especially where carrier actions may constitute fraudulent business practices," J.A. 17, the ICC announced that in carrier actions to collect unpaid tariff charges, it would conduct an "advisory analysis," on referral from a court under the primary jurisdiction doctrine, to "determine * * * whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect." J.A. 22.

4. On the basis of *Negotiated Rates I*, many district courts granted the motions of shippers to refer collection actions to the ICC for a determination whether the parties had agreed on rates that the carrier had failed to file as required by law and whether, under the circumstances, the carrier had engaged in an unreasonable practice. See, *e.g.*, *Delta Traffic Service Inc.* v. *Marine Lumber Co.*, 683 F. Supp. 754 (1987), after referral, 705 F. Supp. 513 (D. Or. 1989), aff'd, 893 F.2d 1016 (9th Cir. 1990); *Motor Carrier Audit & Collection Co.* v. *Family Dollar Stores, Inc.*, 670 F. Supp. 644 (W.D.N.C. 1987). Other courts, however, viewed the ICC's policy statement as simply offering to render a non-binding "advisory" analysis on the issue, and concluded that reference to the Commission was incompatible with the filed rate doctrine. See, *e.g.*, *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), petition for cert. pending, No. 88-1958.

To clarify its policy, and in response to another petition from a shippers' association, the Commission issued a second statement on the issue. *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623, 626 (1989) [hereinafter *Negotiated Rates II*].[7] That statement reaffirmed that the ICC's source of authority for its negotiated rates policy is the statutory requirement that a carrier's practices must be reasonable; consequently, the ICC's determinations constitute a legal,

[7] For the Court's convenience, we have lodged copies of the Commission's decision in *Negotiated Rates II* with the Clerk's office.

rather than an "equitable" defense to an undercharge action. 5 I.C.C.2d at 628 & n.11. To remove any confusion resulting from its use of the term "advisory analysis" in *Negotiated Rates I*, the ICC also explained that its determinations result in "binding and dispositive" orders, subject to review only for arbitrariness and capriciousness. *Id.* at 624, 625. Finally, to protect its jurisdiction in light of the refusal of some courts to refer such claims, the ICC announced that it would rule on negotiated-rates allegations by shippers without awaiting a court referral. *Id.* at 635-636.

B. The Present Controversy

1. a. From 1981 to 1983, a division of Maislin Industries, U.S., Inc. (Maislin), operating as a certificated motor common carrier, made 1,081 shipments of steel for Primary Steel, Inc. (Primary). The vast majority of the shipments were from Primary's Connecticut facilities to 157 destinations in 12 States. Primary negotiated rates with Maislin for this transportation, and Primary understood that Maislin would file the rates in tariffs with the ICC.[8] Despite that understanding, Maislin failed to file the negotiated rates in proper tariffs. Pet. App. 2a, 30a.

Following Maislin's bankruptcy, an audit agency appointed by the bankruptcy court claimed that Maislin's actual tariff rates were higher than the rates charged to Primary. Maislin then commenced an action in district court to recover alleged undercharges in the amount of

[8] Maislin had originally solicited Primary's business in 1979. At that time, Primary told Maislin that it would consider using Maislin if its rates were competitive with those of another firm, P&NE Trucking Co. Based on Maislin's representation that it would meet those rates, Primary began tendering freight to Maislin. Pet. App. 31a. Subsequent rates were also negotiated between Primary and Maislin based on this competitive situation. *Id.* at 31a-32a.

$187,923.36.[9] Relying on the primary jurisdiction doctrine, the district court granted referral to the ICC of Primary's claim that the alleged undercharges resulted from unreasonable practices in violation of the Interstate Commerce Act. Pet. App. 2a, 14a, 17a-19a; J.A. 5-8.

b. Citing its policy statement in *Negotiated Rates I*, the ICC rejected Maislin's argument that an unreasonable-practice determination in the circumstances of this case would violate the filed rate doctrine.[10] The Commission noted that "[i]n the past, ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rate." But "in today's more flexible pricing atmosphere[,] * * * penalizing a shipper for the mistakes of a carrier may be unnecessary to deter discrimination" and would "frustrate[] the intent of the national transportation policy to encourage pricing innovation." The ICC emphasized that it was "not abolishing the requirement in [49 U.S.C. 10761] that carriers must continue to charge the tariff rate." Pet. App. 36a. Nevertheless, the Commission found that "our jurisdiction over unreasonable practices gives us discretion to find that the tariff rate filed by motor carriers need not and should not be applied in a particular case," explaining that it was authorized under 49 U.S.C. 10701(a) and 10704 (1982 & Supp. V 1987) "to consider all the circumstances surrounding an undercharge suit." Pet. App. 34a-35a. The Commission further explained that its inquiry was remedial in nature—to address the carrier practice of negotiating a rate with a shipper, but to file that rate in a tariff even though billing and collecting at it. Pet. App. 35a.

Applying those principles, the ICC found that Maislin's solicitation and billing practices were unreasonable. On

[9] Maislin did not designate the tariff that it believed was applicable, but simply asserted a balance due. J.A. 7.

[10] The Commission's order in this case was entered on January 12, 1988, after it had issued *Negotiated Rates I*, but before it had issued *Negotiated Rates II*.

the basis of extensive factual findings, the ICC concluded that Maislin and Primary had negotiated particular shipping rates. The ICC also concluded that Primary had a reasonable basis for relying on Maislin properly to implement those rates.[11] Consequently, the ICC determined that Primary should not be required to pay additional charges for the difference between the negotiated rates and the tariff rates. Pet. App. 36a-44a.

c. On review of the ICC's order, the district court granted summary judgment in favor of Primary. The court rejected Maislin's arguments that the ICC had exceeded its statutory authority and that its order was barred by the filed rate doctrine. The court also determined that the ICC's order was supported by substantial evidence, and was neither arbitrary nor capricious. Pet. App. 19a-25a.

2. The court of appeals affirmed. Pet. App. 1a-13a. The court first held that the ICC had primary jurisdiction over the claim that Maislin had engaged in unreasonable practices. Relying on *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 65 (1956), the court reasoned that the considerations of agency expertise and the uniform development of policy that underlie the primary jurisdiction doctrine apply with full force here.

The court next turned to Maislin's "central argument"—that the filed rate doctrine barred the district

[11] The ICC did not find that Maislin had engaged in deceit in competing for Primary's shipping business on the basis of unfiled rates. Rather, "[w]hat emerges from a review of this record is that [Maislin] attempted to obtain, in a vigorous competitive manner, Primary's traffic. It then failed to provide (for unknown reasons) for the publishing and filing of those rates." Pet. App. 42a. The ICC also found that for its part, Primary had acted reasonably in relying on those rates, and "[t]here is no evidence that [Maislin] ever demanded additional amounts over the amounts it billed at any time during its business relationship with Primary." *Id.* at 43a. Primary's ignorance of the tariff rate was a factor to "be considered in weighing the equities," but, the Commission found, did not undercut the reasonableness of Primary's belief that "the amounts quoted and billed * * * were the correct total charges." *Ibid.*

court from considering the ICC's finding that Maislin had engaged in an unreasonable practice. The court noted that the statutory source of the filed rate doctrine, 49 U.S.C. 10761(a), requires a carrier to charge the full tariff rate, and that prior Supreme Court decisions had strictly precluded equitable defenses based on ignorance or misquotation of the filed tariff. Pet. App. 7a, citing *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915). The court explained, however, that the ICC has separate statutory authority, set forth in 49 U.S.C. 10701, to require carriers' practices to be reasonable. On that basis, the court distinguished *Negotiated Rates I* from the holdings of *Maxwell* and *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986); although both *Maxwell* and *Square D* supported enforcement of filed rates, neither involved "rates or practices deemed to be unreasonable by the ICC." Pet. App. 9a. The court accordingly concluded that when the provisions governing the collection of rates and the reasonableness of practices conflict, "the proper authority to harmonize these competing provisions is the ICC." *Ibid.*

With those considerations in mind, the court held that the ICC's *Negotiated Rates* policy was a reasonable accommodation of statutory policies. The court determined that the ICC's policy was consistent with the requirement that a carrier charge the filed rate; the effect of the policy was to temper the consequences of that doctrine for shippers who reasonably rely on a carrier's quotation of a negotiated rate. Pet. App. 12a. The court noted that the ICC had properly explained its change in policy by referring to the relaxation of regulatory requirements under the MCA. *Ibid.* The ICC had reasonably determined, the court concluded, that "in light of the regulatory changes 'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between the shippers.'" *Ibid.*, quoting *Seaboard System*

R.R. v. *United States*, 794 F.2d 635, 638 (11th Cir. 1986).

SUMMARY OF ARGUMENT

This case involves a challenge to the validity of the ICC's *Negotiated Rates* policy. After a thorough reevaluation of its prior policies, the ICC announced in *Negotiated Rates* that it would henceforth determine, in particular cases, whether a motor common carrier had engaged in an unreasonable practice, in violation of 49 U.S.C. 10701(a), by negotiating shipping rates, failing to file those rates in tariffs despite the customer's reasonable belief that the carrier would do so, and later rebilling the shipper to collect additional charges based on higher tariff rates actually on file at the ICC. If a shipper establishes the facts showing this course of conduct, then the ICC will enter an order finding it to be an unreasonable practice for the carrier (or its trustee in bankruptcy) to enforce payment of the tariff rate.

In formulating its policy, the ICC carefully considered the competing requirements of two statutory provisions: 49 U.S.C. 10761(a), which requires that carriers charge and collect only those rates that are reflected in ICC tariffs, and 49 U.S.C. 10701(a), which requires that carriers engage only in those practices (including solicitation and billing practices) that are reasonable. The ICC determined that in the present context, Section 10701(a) should be interpreted to prevent carriers (or their bankruptcy trustees) from enjoying windfall profits based on filed tariffs when a shipper has reasonably relied on the carrier to take the steps required to make the negotiated rate lawful. In the Commission's opinion, the formulation of such a remedial policy was necessary to prevent a carrier from exploiting its own failure to fulfill its tariff-filing obligations. See 49 U.S.C. 10762(a)(1).

Petitioners operated a motor carrier that, before its entry into bankruptcy, failed to file all of its negotiated rates in tariffs with the ICC. Petitioners now seek to take advantage of their lapse by imposing additional charges

on a shipper. In an effort to avoid the ICC's regulation of their solicitation and billing practices, they claim the protection of the filed rate doctrine. The filed rate doctrine, however, does not apply in this case. The heart of the filed rate doctrine is the principle that *a court* may not refuse collection of tariff rates based on a claim that the rate is "unreasonable" or that its enforcement would be inequitable. The doctrine was never intended to insulate carriers from *the Commission*'s jurisdiction to regulate unreasonable rates or practices. Rather, a carrier's right to collect a tariff rate is qualified by the Commission's power to determine that the imposition of that rate would be "unreasonable." See *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915).

Negotiated Rates is thus faithful to the historic division of authority between the courts and the Commission reflected in the ~~field~~ filed rate doctrine. Just as the ICC has exclusive authority to determine whether a motor carrier rate is unreasonable, it also has exclusive authority to determine whether a carrier practice is unreasonable. Under *Negotiated Rates*, carriers must file their rates in tariffs, and no court may set aside a tariff based on a shipper's "equitable" defense. The ICC, however, retains exclusive power to find that the carrier's delinquency in filing a negotiated rate amounts to an unreasonable billing practice in violation of Section 10701.

No provision of the Interstate Commerce Act speaks directly to the question whether the Commission may interpret its authority over unreasonable motor carrier practices to preclude the conduct described in *Negotiated Rates*. Nor does the design of the statute as a whole express an intent of Congress on this point. Although *Negotiated Rates* reflects a change from prior ICC policy, it represents a proper administrative response to a recent and unanticipated trend in motor carrier practices. As we previously described (see pp. 5-7, *supra*), the ICC's policy evolved in response to the increasingly competitive environment introduced by the MCA and was framed in

light of the revised national transportation policy. The policy, accordingly, is not addressed to isolated instances of carrier negligence or fraud in billing its customers. Rather, the ICC formulated its policy only after the agency became aware of an industry-wide pattern of delayed collection actions that threatened to undermine the benefits competitive pricing had provided to shippers. *Negotiated Rates* is a reasonable response to a unique problem that arose in the motor carrier industry under the MCA; because that policy does not conflict with the filed rate doctrine, this Court should uphold the ICC's policy as applied in this case.[12]

Under the primary jurisdiction doctrine, the court of appeals correctly upheld referral to the ICC of the *Negotiated Rates* claim in this case. The primary jurisdiction doctrine requires that "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). The primary jurisdiction doctrine governs not only a claim that a carrier's rates are unreasonable, but also a similar claim directed at its practices.

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[12] The majority of the courts of appeals that have addressed this issue have endorsed the validity of *Negotiated Rates*. See *INF, Ltd.* v. *Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989), petition for cert. pending, No. 89-936; *West Coast Truck Lines, Inc.* v. *Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir. 1990); *Delta Traffic Service, Inc.* v. *Appco Paper & Plastics Corp.*, 898 F.2d 472 (2d Cir. 1990). Two other circuits have accepted principles closely related to *Negotiated Rates* without expressly ruling on the policy. See *Carriers Traffic Service, Inc.* v. *Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989) (approving referral of an unreasonable-notation claim to the ICC); *Seaboard System R.R.* v. *United States*, 794 F.2d 635, 638 (11th Cir. 1986) (approving an ICC finding of a rail-carrier unreasonable practice in misquoting a tariff that was unclear to the ordinary user). The Fifth Circuit stands alone in refusing to refer an unreasonable-practice claim to the ICC under *Negotiated Rates*. See *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (1989), petition for cert. pending, No. 88-1958.

Petitioners contend (Br. 12-20) that under *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), the ICC's *Negotiated Rates* policy improperly gives a remedy for past unreasonable practices. This Court, however, has never held that the ICC lacks authority to examine the reasonableness of past motor carrier practices under 49 U.S.C. 10701(a). Although in *T.I.M.E.* this Court denied the ICC the power to examine past motor carrier *rates*, that decision was soon thereafter narrowed by this Court to exclude certain unreasonable practices, and *T.I.M.E.* itself was overruled by Congress.

Referral of a *Negotiated Rates* claim to the ICC in the midst of an action to collect additional tariff charges does not upset the remedial scheme for challenging the reasonableness of a rate or practice contemplated by the filed rate doctrine. Rather, the refusal to refer an unreasonable-practice claim under *Negotiated Rates* would interfere with the ICC's primary jurisdiction, by effectively denying the ICC the opportunity to protect a shipper from being forced to pay charges that stem from an unreasonable practice. Accordingly, the ICC's determination to accept referrals in the midst of a tariff collection action should be upheld.

ARGUMENT

THE ICC'S *NEGOTIATED RATES* POLICY IS A PROPER EXERCISE OF THE COMMISSION'S POWER TO PROTECT AGAINST UNREASONABLE PRACTICES

A. The ICC's *Negotiated Rates* Policy Does Not Conflict With The Filed Rate Doctrine

The filed rate doctrine has historically consisted of two complementary principles. *First*, a *court* adjudicating a tariff collection action may neither set aside the tariff rate as unreasonable, nor entertain an equitable defense based on the shipper's understanding that a different rate would apply. *Second*, because the *ICC* retains exclusive authority to regulate the reasonableness of carrier rates and practices, a carrier may not collect a tariff rate the imposition of which the ICC has found to be unreasonable. Together, these principles preserve the Commission's authority to achieve uniformity and fairness in the regulation of carrier rates and practices, while protecting against discriminatory departures from the tariff. *Negotiated Rates* is firmly rooted in the ICC's power, long recognized as an integral part of the filed rate doctrine, to deny collection of the tariff rate when to do so would involve an unreasonable rate or practice.

1. The filed rate doctrine is based on the provision in the Interstate Commerce Act that carriers must file their rates in public tariffs and charge and collect only the rates filed. 49 U.S.C. 10761(a). That provision was designed to prevent carriers from engaging in rate discrimination that favored some shippers over others, which was a central objective of the Act. See, *e.g.*, *New York, N.H. & H.R.R.* v. *ICC*, 200 U.S. 361, 391 (1906); *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 343-344 (1982); S. Rep. No. 46, 49th Cong., 1st Sess. 181, 188-190, 198-200 (1886). In furtherance of that goal, this Court long ago ruled that a

shipper's ignorance of the tariff rate, or a misquotation of the rate by the carrier, does not justify a court in refusing to enforce the tariff rate.

The classic statement of the filed rate doctrine is set forth in *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915). In that case, an individual had purchased a ticket at the rate quoted by the ticket agent without knowing that the filed tariff reflected a higher rate; he was later sued by the railroad for $58.30 in undercharges. This Court found for the railroad, explaining:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

237 U.S. at 97. The Court concluded that any hardship produced by that rule was necessary to fulfill the anti-discrimination purposes of the Act. *Ibid.* See also *Louisville & Nashville R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 81 (1908).

As the foregoing quotation from *Maxwell* indicates, however, the filed rate doctrine incorporates an important qualification: the filed rate governs "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. That qualification reflects the statutory command that a carrier's rates must be reasonable, 49 U.S.C. 10701(a), and the parallel principle that the Commission alone can determine the reasonableness of rates. As the Court explained in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the Interstate Commerce Act preempted the common-law right of a shipper to contest the reasonableness of rates in a court action. Under the Act, courts could not hear such actions, "without reference to

prior action by the Commission, finding the established rate to be unreasonable." The Court reasoned that the availability of relief for particular shippers in court actions would disrupt the uniform application of rates and would produce "a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced." *Id.* at 440. In contrast, the ICC's invalidation of unreasonable rates would not give rise to discrimination; the ICC could protect against that prospect by prescribing a rate for the future and awarding reparations to shippers injured during the period when the tariff rate was applied. *Id.* at 441-442.

Other cases expounding the filed rate doctrine similarly indicate that the court's obligation to enforce the tariff is subject to the Commission's review of the tariff for reasonableness. For example, in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922), the Court held that a shipper could not bring a private antitrust treble damages action against a carrier based on a claim that tariff rates had been fixed by an agreement prohibited by the Sherman Act. The Court stated that "[t]he legal rights of shipper as against carrier in respect to a rate are measured by the published tariff," and "cannot be varied or enlarged by either contract or tort of the carrier." Significantly, however, the Court added the caveat that the tariff rate applied "[u]nless and until suspended or set aside" by the ICC. 260 U.S. at 163.

The Court again reaffirmed the supremacy of the Commission's authority over rates in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932). In that case, the Court distinguished between carrier-initiated rates, which must be published and filed in tariffs and charged to all similarly situated shippers alike, *id.* at 384, and Commission-prescribed rates. With respect to the former, the Court observed that the Interstate Commerce Act had "altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate."

Ibid. When the Commission exercises its power to prescribe a carrier's future rates, however, those rates "take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rates." *Id.* at 387. As a result, the Court held, even the ICC could not retrospectively find that a carrier's rates were unreasonable when the rates it charged were within the range prescribed by a prior Commission order. *Id.* at 389.[13]

2. This line of cases establishes that the filed rate doctrine restricts the discretion of courts to review the reasonableness of carrier rates and practices, but does not divest the Commission of similar powers. Indeed, the exclusive authority of the ICC to review the reasonableness of rates and practices is one of the key elements of the filed rate doctrine.[14] That doctrine was never intended to render the tariff rate the exclusive measure of rights between shipper and carrier when the Commission has rendered a contrary finding about the reasonableness of imposing that rate.

The *Negotiated Rates* policy was developed against the backdrop of these principles. That policy reflects an implementation of the Commission's fundamental authority to determine whether the imposition of filed rate would involve an unreasonable practice, contrary to the statute.

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[13] Although broad language in some decisions suggests that the tariff rate governs in all circumstances, see, *e.g.*, *Pittsburgh, C.C. & St.L.Ry.* v. *Fink*, 250 U.S. 577, 581-582 (1919); *Boston & M.R.R.* v. *Hooker*, 233 U.S. 97, 112-113 (1914), those cases cannot be read to override the holdings of many other cases (including those discussed in the text) that the ICC's finding that a rate is unreasonable prevails over a tariff rate. See also p. 24, *infra*.

[14] The considerations informing the filed rate doctrine are thus closely allied to those underlying the primary jurisdiction doctrine: both serve to allocate functions between court and agency in order to ensure the uniform and expert administration of a regulatory scheme. Cf. *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956).

Just as the Commission enjoys unchallenged authority to determine that a common carrier cannot insist on the exaction of filed rates found to be unreasonable, so too, the Commission may determine that a carrier cannot collect charges when their imposition involves an unreasonable practice.

The issue in this case is thus quite different from that presented in *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). There, the Court refused to overrule its decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), which had precluded private antitrust claims based on an agreement among motor carriers to fix rates that were filed in tariffs with the ICC. The Court found that the pro-competition policies contained in the MCA were insufficient to justify reconsideration of *Keogh*. Congress was presumed to be aware of the *Keogh* rule, the Court reasoned, yet no statutory provision or specific legislative history evidenced a departure from it. In these circumstances, the Court concluded that "harmony with the general legislative purpose is inadequate for [the] formidable task" of demonstrating that Congress intended to "overturn the long-standing *Keogh* construction." 476 U.S. at 420.

Unlike *Square D*, the question here is not whether a prior decision of this Court construing an Act of Congress should be overruled. The ICC's *Negotiated Rates* policy does not depart from this Court's precedents applying the filed rate doctrine. In each of those decisions, this Court applied the filed rate doctrine to prevent a *court* from recognizing equitable defenses to the collection of the filed tariff rate. As such, none of those decisions speak to the *ICC*'s power to implement the statutory requirement of reasonableness. The narrow question presented for decision is, rather, whether the unreasonable practice described by the ICC in *Negotiated Rates* reflects a permissible construction of the statute, and, if

so, whether a court hearing an action by a motor carrier to collect additional tariff charges should refer such an unreasonable-practice claim to the ICC under the primary jurisdiction doctrine. The court of appeals correctly answered both aspects of that question in the affirmative.

B. *Negotiated Rates* Provides A Permissible Remedy For An Unreasonable Carrier Solicitation And Billing Practice

Section 10701(a) of the Act declares that "a rate * * * *or practice* related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission * * * must be reasonable." 49 U.S.C. 10701(a) (emphasis added).[18] Section 10704 (b)(1) provides that when the ICC decides that a "practice of [a motor common] carrier, does or will violate this chapter, the Commission shall prescribe the * * * practice to be followed." 49 U.S.C. 10704(b)(1). *Negotiated Rates* reflects the ICC's application of these provi-

[18] Congress did not address the question of unreasonable carrier "practices" in the original Interstate Commerce Act (Act of Feb. 4, 1887), ch. 104, 24 Stat. 379. In the Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 589, Congress gave the Commission power to determine whether a railroad's practices were unreasonable and to prescribe a different practice for the future. See *ICC* v. *Illinois Central R.R.*, 215 U.S. 452, 475-477 (1910). In the Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 546, Congress extended that principle by imposing a duty on all rail carriers to engage in "just and reasonable * * * practices." When Congress gave the Commission authority to regulate motor carriers in 1935, it applied the same dual requirement that motor carriers must establish and observe reasonable rates and practices. Motor Carrier Act of 1935, ch. 498, § 216(b), 49 Stat. 558 (codified at former 49 U.S.C. 316 (1976)). In 1978, the Congress revised, codified and enacted Title 49 of the United States Code into positive law, without substantive change (Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1466, 49 U.S.C. 10101 note). In so doing, it consolidated in one section the requirement of reasonable rates and practices for all carriers (other than rail carriers) that the Commission regulates. 49 U.S.C. 10701(a). (Under current law, the requirement of reasonable rates applies to rail carriers only if the ICC finds that a carrier enjoys market dominance. 49 U.S.C. 10701a(b)(1)).

sions to a particular carrier solicitation-and-billing practice that consists of:

> (1) [N]egotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates.

Negotiated Rates II, 5 I.C.C.2d at 628 n.11.

The standards for reviewing petitioners' challenge to the validity of the ICC's interpretation of its governing statute are well settled. The first inquiry is whether the unreasonable-practice provisions, or the design of the statute as a whole, reveal an "unambiguously expressed intent of Congress" on the issue addressed by the ICC's interpretation. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc. (NRDC)*, 467 U.S. 837, 843 (1984). If not, then the ICC's policy must be upheld if it reflects a "permissible construction" of the provisions at issue, *ibid.*, that is, one that is "rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 963-964 (1990).

1. Sections 10701(a) and 10704(b)(1) do not address the precise question whether the carrier billing practice at issue in *Negotiated Rates* may be regulated as an unreasonable practice. Each provision is framed in general terms and represents a charge to the Commission to apply its expertise, in light of the policies of the Act, to determine whether a particular practice is "reasonable." Neither provision provides an unambiguous answer to the issue faced by the ICC in this case.[18]

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[18] Amici Robert Yaquinto *Jr.* et al. (Yaquinto) argue (Br. 22) that the ICC's jurisdiction over unreasonable practices is limited to those practices listed in 49 U.S.C. 10702, which does not identify "misquotation or billing practices." That novel argument, embraced neither by petitioners nor the other amici, is at odds with the traditionally broad reading given to the ICC's unreasonable practice authority. See *Baltimore & Ohio R.R.* v. *United States*, 391 F. Supp. 249, 258 (E.D. Pa. 1975) aff'd, 594 F.2d 856 (4th Cir. 1979) (Table). To begin with, neither Section 10701(a) nor Section 10704 cross-refers to Section 10702; there is no indication that the latter provision was intended to control the former. Moreover, assuming that the cited provisions have some interrelationship, Section 10702 does not enumerate all carrier practices, but merely requires the carrier to establish "rules and practices on matters related to [its] transportation or service, including" several itemized matters. The use of the word "including" signals that the list is illustrative only, not exclusive. Cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941). Finally, this Court in *Adams* v. *Mills*, 286 U.S. 397 (1932), recognized that a billing practice not reflected in a tariff could constitute an "unjust and unreasonable" practice in violation of the Act.

Nor does the structure of the statute as a whole reveal a clearly expressed intent of Congress on this point. The Interstate Commerce Act includes a number of provisions designed to maintain the integrity of the tariff filing system. The Commission's *Negotiated Rates* policy is consistent will each of these provisions, and indeed serves to reinforce the statutory duty imposed on carriers to file and maintain their rates in published tariffs.

Section 10761(a) provides that carriers must have an effective tariff on file in order to provide transportation and that the "carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff." 49 U.S.C. 10761(a). *Negotiated Rates* does not absolve a carrier of the requirement that it charge and collect rates that it has embodied in a proper tariff. See *Negotiated Rates I*, J.A. 16 ("we emphasize that carriers must continue to charge the tariff rate, as provided in the statute"). Rather, *Negotiated Rates* speaks to the *remedies* available to the ICC (as opposed to the courts) when "less than the tariff rate has in fact been charged and paid for past shipments." *Seaboard System R.R.* v. *United States*, 794 F.2d at 638. This remedial question is a matter that the statute does not address.

Specifically, Section 10761(a) does not answer the question whether a tariff rate must be enforced when the application of that rate would reward a carrier's unreasonable practice. Although the carrier ordinarily has a duty to collect the tariff rate, see *Commercial Metals*, 456 U.S. at 343, the Interstate Commerce Act does not authorize collection of a tariff rate that the Commission has found to be unreasonable. See *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (recognizing propriety of a carrier's reduction of its claim below the full tariff rate after ICC had found the tariff rate to be excessive); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960) (ICC order that tariff rates were unreasonable was "by no means a mere 'advisory opinion,' its 'legal consequences' are obvious, for if valid it forecloses the 'right' of the Railroad to recover its domestic rates on those shipments"). The requirement that a carrier must employ reasonable practices is found in the same provision of the Act that requires a carrier to establish reasonable rates. 49 U.S.C. 10701(a). Since Section 10761(a) does not trump Section 10701(a) by requiring a carrier to collect an unreasonable tariff rate, it cannot be construed to require the collection of a rate produced by an unreasonable practice. As is suggested by the introductory phrase of Section 10761(a) ("Except as provided in this subtitle * * *"), that provision is intended to be read in concert with the other provisions of the Act.

Nor does the remedy adopted by *Negotiated Rates* conflict with 49 U.S.C. 10762(a), which requires that "[a] motor carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle." As this section makes clear, the Act imposes the primary duty to assure compliance with Section 10761(a) squarely on the *carrier*, not the shipper. Accordingly, a policy that seeks to impose the consequences of a violation of Section 10761(a) on the derelict carrier rather than the shipper is entirely consonant with this provision. Indeed, contrary to petitioners' suggestion that *Negotiated Rates* will undermine the tariff filing system or "condon[e] noncompliance" with the filed-rate requirement (Pet. Br. 12), the ICC's policy is designed to prevent a carrier from reaping a reward for its own failure to observe the statutory requirements.

The *Negotiated Rates* policy is also consistent with those provisions of the Act that do make express provision for remedies for the violation of Section 10761(a). Specifically, Section 11902 of the Act, 49 U.S.C. 11902, creates civil liability to the United States for a shipper's knowing receipt of a rebate, and Section 11903 of the Act, 49 U.S.C. 11903, imposes criminal liability for the knowing receipt by a shipper (or provision by a carrier) of transportation at below-tariff rates. A shipper that violates those provisions by *knowingly* paying a negotiated but unfiled transportation rate would be barred from taking advantage of the Commission's *Negotiated Rates* policy, because reliance on the applicability of the negotiated rate must be reasonable. On the other hand, a carrier that violates these provisions is hardly in a position to complain if it is later denied the windfall of a higher tariff rate that exists only because it breached its duty to make a timely tariff filing.[17]

In this regard, we do not agree with the suggestion advanced by amici Yaquinto et al. (Br. 15) that the statute embodies a strict policy that imputes "constructive knowledge" of the tariff rate to all persons for all purposes, so that a shipper's reliance on a carrier to implement a negotiated rate can never be reasonable. Such a reading of the Act would render superfluous the specific "knowledge" requirements that are needed to establish

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[17] Moreover, the fact that the statute specifies certain remedies when a carrier collects a rate not filed in a tariff does not exclude the ICC from applying its reasonable-practice powers to the same conduct. See 49 U.S.C. 10321(a) ("The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle."); *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 359 n.3 (1984).

violations involving a deviation from the filed rate under 49 U.S.C. 11902, 11903, 11904 (1982 & Supp. V 1987). See *United States* v. *United States Steel Corp.*, 645 F.2d 1285, 1294-1297 (8th Cir. 1981) (explaining that a shipper's honestly mistaken departure from published rates or its honest mistake as to the appropriate rate was not covered by the predecessor of 49 U.S.C. 11902). The ICC has long adhered to the principle that the reasonableness of attributing knowledge of the tariff rate to a person depends upon the particular circumstances. See *Piedmont Mills, Inc.* v. *Norfolk & Western Ry.*, 296 I.C.C. 481, 485 (1955) (presumption that shippers are conversant with the published tariff not applied in the face of longstanding assurances by the carrier that a different rate applied).[18] A rule of imputed knowledge in all cases would be particularly inappropriate in view of the intensely competitive environment produced by the MCA. As the Commission noted in *Negotiated Rates*, the myriad of rapid rate changes characteristic of the contemporary motor carrier industry has made it "extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file." J.A. 20.

Finally, the ICC's policy does not conflict with the antidiscrimination provision of the Act. 49 U.S.C. 10741 (1982 & Supp. V 1987). To be sure, under *Negotiated Rates*, a shipper whose unreasonable-practice claim is referred to the ICC can be protected against paying the rate reflected in a filed tariff, while that rate may in

[18] Although some older cases of this Court state that knowledge is presumed, *Kansas City Southern Ry.* v. *Carl*, 227 U.S. 639, 653 (1913) ("The shipper's knowledge of the lawful rate is conclusively presumed * * *."); *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155, 166 (1912) (shipper was "presumed to have known" of published rates), those cases did not involve instances where the shipper reasonably relied on the carrier to implement a negotiated rate by properly filing a tariff. Since only a carrier can file a tariff, 49 U.S.C. 10762(a)(1), the ICC may reasonably conclude, in remedial proceedings, that the shipper should not be compelled in a particular case to bear the costs of the carrier's breach of that duty.

theory have been applied to some other shippers. The same is true, however, whenever a claim of unreasonable rates is referred to the ICC. Nevertheless, it has been settled since *Abilene Cotton* that a finding by the ICC that a tariff rate is unreasonable does not produce discrimination in violation of the statute. 204 U.S. at 441-442. If a shipper has previously paid the tariff rate, rather than lower rates negotiated with other shippers, it may bring a claim alleging unreasonable discrimination, 49 U.S.C. 11705(b)(3), and may recover if it satisfies applicable standards governing such a claim. See *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959, 963 (1984) (describing criteria for a discrimination claim).[19]

2. Because the Interstate Commerce Act does not speak to the precise question addressed in *Negotiated Rates*, the validity of the policy turns on its reasonableness in light of the statutory scheme. In *Negotiated Rates I*, the Commission explained the considerations that prompted its

[19] Petitioners (Br. 28-29) and Amici Oneida Motor Freight, Inc. et al. (Br. 11-12) also rely on the Household Goods Transportation Act of 1980, 49 U.S.C. 10735(a)(1) (1982 & Supp. V 1987) in an effort to demonstrate that Congress deliberately intended to preclude the ICC from recognizing a defense to a carrier's collection action based on the filed rate. That provision states that a motor common carrier may "establish a rate for the transportation of household goods which is based on the carrier's written, binding estimate of charges for providing such transportation." Amici Oneida imply that because Congress in that context specifically provided for "a negotiated unfiled rate to be binding on the parties" (Br. 11), it could not have intended to authorize such a result in any other context. But the household goods provision addressed the quite different problem of consumer dissatisfaction with a carrier's departure from a quotation because of an incorrect estimate of the *weight* of the goods to be shipped, not an incorrect quotation of the tariff *rate*. See H.R. Rep. No. 1372, 96th Cong., 1st Sess. 7 (1979). "In order to address this problem, these subsections create a foundation for written binding estimates." *Ibid.* There can be no negative implication from this provision that Congress intended to limit the Commission's powers under its unreasonable-practices jurisdiction, as applied to motor carriers that violate the Act by failing to file their negotiated rates.

action. While the Commission historically rejected claims that the misquotation of rates impairs the carrier's right to collect the filed rate, see *A.J. Poor Grain Co.* v. *Chicago, B.&O. Ry.*, 12 I.C.C. 418, 422-423 (1907), Congress's substantial amendment of the national transportation policy in the MCA caused the ICC "to take a fresh look at the proper regulatory response to the matter of unfiled negotiated motor carrier rates." J.A. 18.

In the MCA, Congress declared that "it is the policy of the United States Government * * * in regulating transportation by motor carrier, to promote competitive and efficient transportation services," in order to achieve, among other things, "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping * * * public." 49 U.S.C. 10101(a)(2).[20] Under the MCA, thousands of new carriers have entered the market and have competed vigorously for business, under a regime allowing for far greater pricing freedom than prevailed under prior law. With "hundreds, or even thousands, of individual motor common carrier rates * * * negotiated daily," the ICC noted "it can be extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file." J.A. 20. Rigid enforcement of the tariff rate when "a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged (and therefore presumably filed as a tariff)" threatened to undercut the development of competitive markets, as intended by the MCA. *Ibid.*

At the same time, the MCA authorized pricing activities that would previously have constituted unlawful discrimination. For example, the MCA eliminated the prohibition against a carrier's holding dual authority to engage in both contract and common-carrier operations. See *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d at 311 & n.55. A carrier operating in contract capacity can serve a shipper without publishing its rates in tariffs at all, *id.* at 305, and without being subject to the antidiscrimination provisions of the Act, *id.* at 325 & n.152. J.A. 21; see *Negotiated Rates II*, 5 I.C.C.2d at 633. Moreover, a common-carrier tariff may be limited to a particular shipper without being per se discriminatory. See *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984). With the availability of such lawful, individualized pricing options, it is highly implausible to suppose that a common carrier would quote below-tariff rates as a means to discriminate between shippers.[21]

Collectively, these regulatory changes signal a dilution of the antidiscrimination purposes that had previously animated the Act. J.A. 20-21. Against that background, the ICC properly concluded that "'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers.'" J.A. 21,

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[20] See H.R. Rep. No. 1069, 96th Cong., 2d Sess. 27-28 (1980); 126 Cong. Rec. 7,777 (1980) (statement of Sen. Cannon). This Court has recognized that "[t]he legislative history of the Act is clear that * * * Congress wanted the forces of competition to determine motor-carrier tariffs." *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 367 (1984).

[21] In addition, in *Negotiated Rates II*, the Commission drew on its experience in referred cases (such as the present one) to observe:

> [T]here has been nothing in the records of the cases we have reviewed to suggest that it was the intent of the parties to establish secret, discriminatory rates. Rather, the carriers simply negotiated these rates to attract business, not with any intent to prefer one of their shippers to the disadvantage of others. Indeed, the effort was to promote and sell the carrier's service generally, not to attract a particular customer. The shipper made its determination to use the carrier's service based on the quoted rate. To permit the carrier subsequently to collect a substantially different higher rate for the past transportation service because it failed to publish the rate would be antithetical to a fundamental purpose of publishing rates—*i.e.*, to permit shippers to choose the best rate for their shipments from among those offered by competing carriers.

5 I.C.C.2d at 631-632.

quoting *Seaboard System R.R.* v. *United States*, 794 F.2d at 638. In light of Congress's understanding that the ICC must have "sufficient flexibility" to realize the statute's diverse objectives, H.R. Rep. No. 1069, 96th Cong., 2d Sess. 12 (1980), the Commission's *Negotiated Rates* properly draws upon Section 10701 to implement Congress's overall goals for the motor carrier industry.[22]

Moreover, to embrace the view that the statute requires collection of the tariff rate regardless of the presence of an unreasonable practice, as petitioners apparently contend (Pet. Br. 9-12 & n.6), would lead to absurd results. If the tariff-collection provision prevailed over the requirement of reasonable practices, a carrier could intentionally engage in "bait and switch" tactics by negotiating one rate, fraudulently representing that it was properly filed, and then insisting upon collection of a higher tariff rate. The requirements of Section 10761(a), which were intended to prevent intentional discrimination, cannot be construed to leave the Commission helpless to provide redress for shippers' injuries flowing from such affirmative misconduct.[23] Indeed, this Court has specifically reserved the question, "whether the filed rate doctrine applies in the face of fraudulent conduct." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 583 n.13 (1981).[24]

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[22] Contrary to petitioners' view (Br. 26), the ICC is not relying on the "general purpose of the 1980 Act * * * to overcome the strict requirements and harsh results of the filed rate doctrine." The ICC is not calling into question the filed rate doctrine at all. Rather, the ICC is exercising its administrative powers over unreasonable practices pursuant to the policy directions given to it by Congress.

[23] This is particularly true since the Act makes the failure of a carrier to file and publish its rates a criminal violation. 49 U.S.C. 11903(b).

[24] The lower courts have generally held that the filed rate doctrine precludes courts from granting relief on the basis of a carrier's fraud. *See Consolidated Freightways Corp.* v. *Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir. 1980) (per curiam) (collecting cases); cf. *Marco Supply Co.* v. *AT&T Communications, Inc.*, 875 F.2d 434, 435 (4th Cir. 1989) (applying same rule to an FCC tariff). If those decisions

Whether the filed rate doctrine prevents a *court* from declining to enforce a tariff rate based on a finding of affirmative misconduct is not at issue here. The ICC, however, surely has discretion, in administering its express remedial authority over unreasonable practices, to devise a response to such misconduct or related unfair practices. Such a response may include, if the ICC finds it appropriate, the remedy of nonenforcement of the tariff rate. Cf. *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 352 (1982) ("The remedies for a carrier's violations of the [credit] regulations are best left to the ICC for such resolution as it thinks proper.").

The fact that *Negotiated Rates* represents a change in the ICC's interpretation of its unreasonable-practice powers does not cast doubt on the policy's validity. As the Court observed in *American Trucking Ass'ns, Inc.* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416 (1967):

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

See also *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. at 863 ("that the agency has from time to time changed its interpretation [does not mean] that no deference should be accorded the agency's interpretation of the statute"). Provided that the Commission adequately explains its rationale, as it did here, the ICC is free to make permissible changes in the construction of its governing statute. Cf. *Atchison, T.&S.F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 805-809 (1973) (plurality opinion);

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are correct, under petitioners' view of the law no tribunal would have the power to protect shippers from a carrier's deliberate fraud regarding its applicable rates.

Motor Vehicles Manufacturers Ass'n v. *State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 41-42 (1983).

In any case, *Negotiated Rates* has roots in the ICC's traditional use of its unreasonable-practice powers. For example, the ICC has long exercised its unreasonable-practice powers to prevent a carrier from enforcing a higher filed rate when a notation on a bill of lading (which was required by a tariff containing a lower rate) was inadvertently omitted. See *Standard Brands, Inc.* v. *Central R.R.*, 350 I.C.C. 555 (1974); cf. *Dulien Steel Products, Inc.* v. *New York, N.H. & H. R.R.*, 287 I.C.C. 386 (1952). These "superfluous notation" cases illustrate the longstanding exercise of the ICC's power to temper unintended consequenecs or inequitable results for shippers stemming from the inflexible application of tariffs. The extension of those principles to encompass the unreasonable practices found in the present case accords with the underlying purposes and express provisions of the Act.

Finally, the ICC is not barred from adopting *Negotiated Rates* simply because Congress did not anticipate the problem addressed by that policy and legislatively provide a solution. Even where the Commission has not relied on a specific statutory power, this Court has sustained the agency's authority to devise remedies needed to implement the goals set forth in the statute. In *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 364-365 (1984), the ICC developed the new remedy of retroactively rejecting effective tariffs submitted in substantial violation of rate-bureau agreements. Despite the absence of express statutory authority for that remedy in the MCA or in predecessor provisions, this Court upheld it as a proper exercise of the ICC's discretionary powers because it was "directly and closely tied" to a specific statutory mandate. *Id.* at 367. In this case, *Negotiated Rates* does not spring from the ICC's implied authority to carry out the Act, but from its express responsibilities over unreasonable practices. Applying the same considerations of deference expressed in *American Trucking Ass'ns*, the ICC's determination to protect shippers against shouldering the unfair costs produced by a carrier's failure to file the agreed rate is a valid exercise of agency discretion.[25]

C. Referral To The ICC Of A Claim Under *Negotiated Rates* Is Required Under The Primary Jurisdiction Doctrine

If the Commission's *Negotiated Rates* policy reflects a permissible interpretation of its authority to proscribe unreasonable practices under 49 U.S.C. 10701(a), then the remaining question is whether a district court hearing a tariff collection action should refer to the ICC, under the primary jurisdiction doctrine, a shipper's unreasonable-practice claim under *Negotiated Rates*. Relying on this Court's primary jurisdiction decisions, the court below correctly held that referral to the ICC is required in this situation.

1. The primary jurisdiction doctrine requires that "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). The doctrine protects the uniform development of policy by the ICC and ensures the application of accumulated agency expertise to questions requiring intimate familiarity with conditions of the regulated industry. *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 255-

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[25] It is unquestionably within the Commission's power to determine that the appropriate remedy for the unreasonable practices identified in *Negotiated Rates* is to apply the rate originally negotiated rather than the tariff rate. Enforcing the negotiated rate allows the shipper to retain the benefit of the bargain it has reached with the carrier, consistent with the policy of the MCA to promote a competitive marketplace in order to meet the needs of shippers. 49 U.S.C. 10101(a)(2). Indeed, in the highly competitive environment that now characterizes the industry, such a remedy is singularly appropriate, because the negotiated rate normally reflects the prevailing rate that the shipper could have obtained from competing motor carriers.

259 (1913); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956); *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 580, 594 (1966); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976). The primary jurisdiction doctrine governs not only a claim that a carrier's *rates* are unreasonable, but also a similar claim directed at a carrier's *practices*. *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962) (primary jurisdiction applies to a claim that a carrier's misrouting constitutes an unreasonable practice); *Northern Pacific Ry.* v. *Solum*, 247 U.S. 477, 483 (1918) ("the rule which requires * * * preliminary determination of administrative questions by the Commission applies * * * to any practice of the carrier which gives rise to the application of a rate").

The foregoing principles dictate that a claim under *Negotiated Rates* must be referred to the ICC. The power to declare a practice unreasonable is entrusted to the ICC's administration; there is no residual power in a court to declare that a practice is unreasonable in violation of the statute. Cf. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940) ("When it appeared * * * that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act."). Indeed, Congress has given statutory authority to the district courts to refer cases to the ICC in order to avail themselves of the Commission's primary jurisdiction. 28 U.S.C. 1336(b).

The considerations of uniformity and agency expertise underlying the primary jurisdiction doctrine fully apply here. The ICC's *Negotiated Rates* determinations bring to bear the agency's expertise in evaluating transportation practices. See J.A. 22. Although it is true that a case referred under *Negotiated Rates* has elements of contract law, the proper evaluation of the facts in a particular case requires familiarity with competitive conditions,

trade customs, and methods of dealing in the motor carrier industry. The ICC is by design much more fully steeped in such matters than the generalist courts.[26] In determining that Primary reasonably relied on Maislin to implement the negotiated rates, the ICC drew upon its experience with "other similar proceedings before the Commission involving Maislin" that encompassed "over 40 shippers and many thousands of shipments." Pet. App. 41a. Those proceedings provided the ICC with the background necessary to perceive a pattern in Maislin's dealings with shippers.

In addition, consolidating review of all unreasonable practice claims before the ICC facilitates the consistent resolution of analogous claims. Cf. *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134, 147-148 (1946). Finally, reference of *Negotiated Rates* cases to the Commission provides it with the raw material for evaluating the success of its efforts to apply the statutory policies to motor carrier billing practices, and to make any appropriate adjustments.[27]

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[26] For example, in this case the Commission had to determine whether particular rates listed in "rate sheets" provided adequate evidence of the existence of negotiated rates between Maislin and Primary. Pet. App. 37a-38a. That inquiry involved the evaluation of expert testimony, the procedures used by the parties to establish "point to point" rates, and the issue whether asserted discrepancies between the billed rates and the rate sheets undermined the contention that the rates were negotiated. In concluding that the discrepancies were not dispositive, the ICC noted that the "fuel surcharge fold-in" explained some of those discrepancies (because a one-step rounding process was used at the quotation stage, while a two-step rounding process was used at the billing stage), and that the remaining instances of one-to-two cent deviations were not significant under the circumstances. *Id.* at 39a-40a. Although courts also are capable of resolving such matters, it is readily apparent the ICC's appraisal of the facts was assisted by its knowledge of the ways of the transportation industry.

[27] The ICC advises us that it has currently received 237 claims under *Negotiated Rates* (including cases referred by courts and cases filed directly with the agency).

2. Relying principally on *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), petitioners contend (Br. 12-20) that even if the ICC has primary jurisdiction to adjudicate the reasonableness of carrier practices, the ICC's *Negotiated Rates* policy improperly gives a remedy for past unreasonable practices where Congress intended none to exist. Petitioners' interpretation of the statutory scheme is mistaken.

This Court has never held that the ICC lacks authority to examine the reasonableness of past motor carrier practices under 49 U.S.C. 10701(a). In *T.I.M.E.*, *supra*, the Court held by a 5-4 vote that in an undercharge action by a motor carrier, a court could not refer to the ICC the shipper's defense that the tariff *rate* imposed in the past was unreasonable. The Court stated that neither the Motor Carrier Act of 1935 nor the common law authorized a shipper to challenge, in postshipment litigation, the reasonableness of tariff rates previously charged by a motor carrier. Three years later, in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), the Court distinguished *T.I.M.E.* in allowing the Commission to review past unreasonable practices. In that case, a shipper had filed suit against a carrier for unreasonable routing practices that caused the shipper to make excessive payments. The Court held that an action for misrouting survived passage of the Motor Carrier Act, and that the question whether the carrier's past routing practices were unreasonable should be referred to the ICC under its primary jurisdiction.[28]

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[28] *T.I.M.E.* and *Hewitt-Robins* created confusion about the exposure of motor carriers to liability for past rates and practices. As the Comptroller General informed Congress, "[p]rior to the T.I.M.E. decision, under established rules of law, our auditors availed the Government of the Commission's prior findings of unreasonableness of motor carrier rates *and practices*." The Comptroller added that the *Hewitt-Robins* decision had caused uncertainty by approving one postshipment remedy for an unreasonable carrier practice, but leaving it unclear whether other remedies for past unreasonable practices would also be acknowledged. Letter from Joseph Campbell, Comptroller General of the United States, to Hon. Oren Harris (Mar. 29, 1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News 2936-2939 (emphasis added).

Congress responded to both decisions: it overruled *T.I.M.E.* by amending the Motor Carrier Act; in the process, the House Report specifically indicated approval of *Hewitt-Robins*.[29] The clear import of Congress's action was to authorize the Commission to determine that a carrier's past charges did not conform to the requirements of the Act, as had been ICC's established practice before *T.I.M.E.* See *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337 (1944). There can be no doubt that in acting to "restore" a procedure it thought to be previously available to shippers, and in indicating (albeit informally) approval of *Hewitt-Robins*, Congress intended to open past motor carrier rates and practices to legal challenges by shippers under the same standards of reasonableness that governed future rates and practices.

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[29] Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 (codified at 49 U.S.C. 11705(b)(3) (1982 & Supp. V 1987), 49 U.S.C. 11706(c)(2)). The amended statute authorized reparations against motor carriers for past shipments, and defined "reparations" to mean "damage resulting from charges for transportation services to the extent that the Commission * * * finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." 49 U.S.C. 304a(5) (1976). The House Committee Report confirmed the intent of the legislation to "permit a court * * * to award reparations to persons injured *through violations of the Interstate Commerce Act* by motor carriers and freight forwarders subject thereto. This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to aid the court by making necessary administrative determinations relating to the amount of reparations." H.R. Rep. No. 253, 89th Cong., 1st Sess. 12 (1965) (emphasis added). The Report stressed that the legislation was designed to "restore a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by the decision in the *T.I.M.E.* case." *Ibid.* The Report also stated that the provision overruling *T.I.M.E.* "would not affect in any way the right of shippers to recover damages from misrouting under the Hewitt-Robins doctrine." *Ibid.*

Petitioner provides no support for the view that Congress understood that it was leaving some past unreasonable practices insulated from review. Indeed, if petitioners' contention were accepted, it would call into question the well-settled practice of referring unreasonable "notation" claims to the ICC, when a shipper contends that a lower tariff rate is applicable even though the bill of lading lacked a required notation. See *Carriers Traffic Service, Inc.* v. *Anderson, Clayton & Co., supra*; cf. *Western Transp. Co.* v. *Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982).

Under the language enacted by Congress to overrule *T.I.M.E.*, a shipper may be awarded reparations for "charges for transportation services to the extent that the Commission * * * finds them to have been unjust and unreasonable." 49 U.S.C. 304a(5) (1976). The current version of that provision, reflecting the recodification of the Act in 1978, is equally encompassing. It states that a motor common carrier "is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle." 49 U.S.C. 11705(b)(3) (1982 & Supp. V 1987).[30] Under a natural reading of the statutory text, both of these formulations cover the type of claim defined by *Negotiated Rates*.[31]

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[30] The 1978 reenactment was not designed to work substantive changes in the law, see note 15, *supra*.

[31] Congress's focus in overruling *T.I.M.E.* was naturally on rates, since that was what was directly at issue in *T.I.M.E.* But we are unaware of any decision holding that an unreasonable practice that affects rates falls outside of 49 U.S.C. 11705(b)(3).

Petitioners also note (Br. 20) that, as to rail and water carriers, the Act authorizes reparations for "an act or omission of that carrier in violation of this [Act]." 49 U.S.C. 11705(b)(2). While this formulation differs from that applicable to motor carriers, petitioners are incorrect in suggesting that this difference has any significance for this case. Whether or not the reparations provision for rail and water carriers has a wider application for a violation of the Act that does not involve the imposition of rates, there is no basis for limiting the plain meaning of Section 11705(b)(3) as to a violation that does involve the imposition of rates—as does the violation addressed by *Negotiated Rates*.

Indeed, any narrower reading of Section 11705(b)(3) in the present context would be entirely artificial, since the shipper's core complaint in a *Negotiated Rates* case is that imposing a tariff rate is unreasonable because of the carrier's underlying conduct. While the ICC has described a *Negotiated Rates* claim as an unreasonable practice, a parallel analysis could be applied to declare that a negotiated, but unfiled rate is in certain circumstances the maximum reasonable rate. See *Iowa Power & Light Co.* v. *Burlington Northern, Inc.*, 647 F.2d 796, 807-809 (8th Cir. 1981) (upholding an ICC order prescribing, as a maximum reasonable rate, the rate negotiated between the parties rather than the tariff rate filed by the carrier), cert. denied, 455 U.S. 907 (1982); *Burlington Northern Inc.* v. *United States*, 679 F.2d 915, 917 (D.C. Cir. 1982) (per curiam) (sustaining the ICC's consideration of the parties' understanding as an "important factor" in determining a maximum reasonable rate).[32] In that setting, reparations or a referral to the ICC of a defense to an undercharge action would clearly be allowed even under petitioners' theory. Given that the same relief could be granted to shippers if their claim were described in terms of unreasonable rates rather than unreasonable

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[32] The ICC's unreasonable-rate determinations have often been influenced by a course of dealing between the parties or the understanding that particular rates were applicable. See *Piedmont Mills, Inc.* v. *Norfolk & Western Ry.*, 296 I.C.C. 481, 485 (1955) (carrier's rate misquotation does not ordinarily support shipper's damages claim, but carrier's consistently expressed view that rates charged were applicable under published tariffs was entitled to weight); *Garson Iron & Steel Co.* v. *Atlantic & N.C. R.R.*, 237 I.C.C. 724, 726 (1940) (carrier intended to publish rates comparable to competitors, but made an error in filing its tariff); *Sheboygan Fruit Box Co.* v. *Chicago & N.W. Ry.*, 214 I.C.C. 157, 158 (1936) (carrier applied non-tariff rates through an oversight, following which parties agreed to establish those rates in a tariff).

practices, it can hardly be maintained that the referral to the ICC of a *Negotiated Rates* claim is inconsistent with the statutory scheme.[33]

3. This Court has never held, in a tariff collection action by a motor carrier, that the filed rate doctrine precludes a district court from staying further judicial proceedings pending reference of a question of reasonableness to the ICC. The Fifth Circuit, however, has reached this conclusion in declining to refer a *Negotiated Rates* case to the ICC. *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d at 391-393 & n.6, citing *Southern Pacific Transportation Co.* v. *San Antonio*, 748 F.2d 266, 274 (5th Cir. 1984). This Court should not endorse the Fifth Circuit's rule restricting the power of courts to stay a motor carrier tariff collection action.

The *Southern Pacific* decision, on which the Fifth Circuit relied, involved considerations not pertinent here. In *Southern Pacific*, the district court had stayed enforcement of a judgment in favor of a rail carrier, based on

[33] Petitioners argue (Br. 21-23) that Section 11705(b)(3) must be read to exclude a claim under *Negotiated Rates* because the competing legislation to overrule *T.I.M.E.* that was favored by the ICC would have swept more broadly. Because the plain language of Section 11705(b)(3) reaches this case, however, it is irrelevant that some proposed bills would have gone farther. In any event, the major distinguishing feature of the bill favored by the ICC was that it would have permitted shippers the choice of filing a reparations complaint with the ICC or commencing an action in court. Under the legislation enacted by Congress, a shipper must file a complaint in court, whereupon the court refers to the Commission the issue of reasonableness. See *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403, 412-413 (1969). That distinction goes to the procedural mechanisms for administering a reparations claim, not to the substance of the claim. As the ICC explained: "While in the opinion of the Commission uniformity *with respect to procedure* for handling reparations under parts I, II, III, and IV of the act would have been desirable, Congress elected to provide otherwise." *Id.* at 413 (emphasis added). Congress's rejection of the ICC's preferred approach has no substantive implications for the present case.

the filed tariff rate, pending the ICC's determination in an ongoing proceeding whether the tariff rate was unreasonably high. Noting that the shipper would later have an adequate opportunity to seek reparations, the court of appeals stated that "execution of the railroads' judgment would not render the I.C.C.'s determination moot or ineffectual." 748 F.2d at 273. Consequently, compelling the shipper "to pay the filed rate immediately would not interfere with the I.C.C.'s primary jurisdiction." *Id.* at 272-273.

In contrast, the refusal to refer an unreasonable-practice claim here would interfere with the ICC's primary jurisdiction. In the typical case governed by the ICC's *Negotiated Rates* policy, the motor carrier is insolvent and hence unable to satisfy any subsequent reparation order.[34] In these circumstances, enforcement of the filed tariff without referral to the ICC would effectively nullify the reasonableness requirement of the statute: it would undermine the ICC's meaningful exercise of its unreasonable-practice jurisdiction and would deny the shipper an adequate remedy. For its part, the carrier can assert no offsetting equity in insisting upon prompt payment when the collection of the rates may entail an unreasonable practice and the carrier is not prepared later to reimburse the shipper. The carrier simply has no right to collect rates or to engage in practices that the ICC finds are

[34] Amici Overland Express, Inc. (Br. 16-18) and Yaquinto (Br. 16-17) contend that *Negotiated Rates* conflicts with the Bankruptcy Code, but neither cite any provision of the Code that remotely bears on the present issue. The obligation of a bankruptcy trustee to collect claims owed to the estate does not authorize the collection of funds in violation of public policy. Cf. 11 U.S.C. 362(b)(4) (police and regulatory exception to automatic bankruptcy stay). The ICC's determination that the carrier's claim is tainted by an unreasonable practice invalidates that claim. Nor does it undermine the Bankruptcy Code to deny the creditors of a failed carrier the fruits of the carrier's dereliction of its duty to file its negotiated rates. In short, the Bankruptcy Code provides no basis for shifting losses from the carrier's creditors to the innocent shipper.

unlawful. Cf. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. at 520; *Pennsylvania R.R.* v. *United States*, 363 U.S. at 205. In that situation, where the ICC has determined to accept referrals in the midst of a collection action, a court should stay judicial proceedings pending referral of the unreasonable practice charge to the Commission. Cf. *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982) (structuring court review of ICC determinations to preserve the ICC's primary jurisdiction and to protect parties unable to benefit from later reparation proceedings).[35]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[35] As petitioners note (Br. 26), a bill has been introduced in the House that would, among other things, essentially codify the policy reflected in *Negotiated Rates*. H.R. 3243, 101st Cong., 1st Sess. (1989). The bill has been referred to the Committee on Public Works and Transportation, and has not been reported out of committee. We will apprise the Court of any legislative developments affecting this case.

APPENDIX

49 U.S.C. 10701(a) provides in pertinent part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987) provides in pertinent part:

> When the Commission decides that a rate charged or collected by—
>
> > (A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;
> >
> > * * * * *
>
> or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

49 U.S.C. 10761(a):

> Except as provided in this subtitle, a carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person,

giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. 10762(a)(1) provides in pertinent part:

A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs.

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